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No. 52

In the Supreme Court of the United States

OCTOBER TERM, 1959

JOSE TERRONES RIOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Constitutional provisions and statute involved	2
Statement	3
Summary of argument	8
Argument	14
I. Introduction	14
II. The action of the state officers in approaching the taxicab and identifying themselves did not invade any rights of petitioner	16
A. Petitioner's liberty was not restrained by the appearance of the officers	18
B. There was adequate justification for any detention that may have been involved	22
1. The limited detention involved in making inquiry is not an arrest; its propriety must be judged by reasonableness under all the circumstances	25
2. The officers had a reasonable basis for inquiry	37
III. If the officers lawfully approached the taxicab, their subsequent seizure of the narcotics and arrest of the petitioner were lawful	40
Conclusion	44

CITATIONS

Federal cases:	
Abbate v. *United States*, 359 U.S. 187	8
Adams v. *New York*, 192 U.S. 585	42
Agnello v. *United States*, 269 U.S. 20	44
Barkus v. *Illinois*, 359 U.S. 121	8
Bell v. *United States*, 254 F. 2d 82, certiorari denied, 358 U.S. 885	41
Bennett v. *United States*, 145 F. 2d 270, certiorari denied, 323 U.S. 788	42

Federal cases—Continued

	Page
Bowles v. *Glick Bros. Lumber Co.*, 146 F. 2d 566, certiorari denied, 325 U.S. 877	42
Bowles v. *Ray*, 146 F. 2d 652, certiorari denied, 325 U.S. 875	42
Boyd v. *United States*, 286 Fed. 930	41
Brady v. *United States*, 148 F. 2d 394	40
Brinegar v. *United States*, 165 F. 2d 512, affirmed, 338 U.S. 160	32, 33, 34
Burton v. *United States*, decided Nov. 16, 1959 (C.A. 9)	27
Carroll v. *United States*, 267 U.S. 132	42, 44
Carter v. *United States*, 231 F. 2d 232, certiorari denied, 351 U.S. 984	27
Draper v. *United States*, 358 U.S. 307	43
Elkins v. *United States*, No. 126; this Term	8, 14
Ellis v. *United States*, 264 F. 2d 372, certiorari denied, 359 U.S. 998	27
Ellison v. *United States*, 206 F. 2d 476	40, 41
Fisher v. *United States*, 205 F. 2d 702, certiorari denied, 346 U.S. 872	41
Fowler v. *United States*, 239 F. 2d 93	35
Gilliam v. *United States*, 189 F. 2d 321	35, 36
Giordenello v. *United States*, 357 U.S. 480	23
Green v. *United States*, 259 F. 2d 180, certiorari denied, 359 U.S. 917	27
Haerr v. *United States*, 240 F. 2d 533	40
Harris v. *United States*, 331 U.S. 145	41
Henry v. *United States*, No. 17, this Term, decided November 23, 1959	10, 22, 23
Hester v. *United States*, 265 U.S. 57	40
Hobson v. *United States*, 226 F. 2d 890	40
Irvine v. *California*, 347 U.S. 128	8
Jenkins v. *United States*, 161 F. 2d 99	30
Jordan v. *United States*, 254 F. 2d 710	35
Kelly v. *United States*, 197 F. 2d 162	42
Lane v. *United States*, 148 F. 2d 816, certiorari denied, 326 U.S. 720	42
Lawn v. *United States*, 355 U.S. 339	8
Lawson v. *United States*, 254 F. 2d 706	35
Lee v. *United States*, 221 F. 2d 29	27, 38–39, 40
Long v. *Ansell*, 69 F. 2d 386	30
Love v. *United States*, 170 F. 2d 32, certiorari denied, 336 U.S. 912	42

Federal cases—Continued — Page

Lustig v. *United States*, 338 U.S. 74 — 7
McCarthy v. *United States*, 264 F. 2d 473 — 34, 35
McQuaid v. *United States*, 198 F. 2d 987, certiorari denied, 344 U.S. 929 — 41
Martin v. *United States*, 155 F. 2d 503 — 40
Mason v. *United States*, 257 F. 2d 359, certiorari denied, 358 U.S. 831 — 40
Mazer v. *Stein*, 347 U.S. 201 — 8
Morgan v. *United States*, 159 F. 2d 85 — 35
Morton v. *United States*, 147 F. 2d 28 — 30
Petteway v. *United States*, 261 F. 2d 53 — 41
Poulas v. *United States*, 95 F. 2d 412 — 27
Safarik v. *United States*, 62 F. 2d 892 — 41
Smith v. *United States*, 2 F. 2d 715 — 41
Smith v. *United States*, 264 F. 2d 469 — 34
Steele v. *United States No. 1*, 267 U.S. 498 — 41, 42
United States v. *Di Re*, 332 U.S. 581 — 16
United States v. *Lee*, 274 U.S. 559 — 41
Weathersbee v. *United States*, 62 F. 2d 822, certiorari denied, 289 U.S. 737 — 27
Weeks v. *United States*, 232 U.S. 383 — 44
Work v. *United States*, 243 F. 2d 660 — 40
Zap v. *United States*, 328 U.S. 624 — 41

State cases:

Baines v. *Brady*, 122 Cal. App. 2d Supp. 957 — 29
Campbell v. *Commonwealth*, 203 Ky. 151 — 28
Gisske v. *Sanders*, 9 Cal. App. 13 — 29
Hargus v. *State*, 58 Okla. Cr. 301 — 28
Johnson v. *State*, 118 Tex. Cr. Rep. 293 — 28
Pena v. *State*, 111 Tex. Cr. Rep. 218 — 28
People v. *Blodgett*, 46 Cal. 2d 114 — 38
People v. *Brown*, 147 Cal. App. 2d 352 — 43
People v. *Gusukuna*, 152 Cal. App. 2d 185 — 43
People v. *Hennemann*, 367 Ill. 151 — 28
People v. *Hood et al.*, 150 Cal. App. 2d 497 — 43
People v. *Jaurequi*, 142 Cal. App. 2d 555 — 28
People v. *Mendoza*, 145 Cal. App. 2d 279 — 43
People v. *Michael*, 45 Cal. 2d 751 — 28
People v. *Perry*, 79 Cal. App. 2d 906 — 38
People v. *Seely*, 66 Cal. App. 2d 408 — 28
People v. *Smith*, 141 Cal. App. 2d 399 — 28

	Page
State Cases—Continued	
People v. *Wickliff*, 144 Cal. App. 2d 207	43
People v. *Woods*, 139 Cal. App. 2d 545, certiorari denied, 352 U.S. 1006	43
State v. *Gulczynski*, 32 Del. 120	27
State v. *Zupan*, 155 Wash. 80	28
Trowbridge v. *Superior Court*, 144 Cal. App. 2d 13	43
English cases:	
Lawrence v. *Hedger*, 3 Taunt. 13	26
Rex v. *Bootie*, 2 Burr. 864	26
Constitution and Statutes:	
United States Constitution:	
Fourth Amendment	2, 10, 11, 22, 29, 30, 42
Fourteenth Amendment	2, 22
21 U.S.C. 174	3
California Health and Safety Code:	
Sec. 11500	6
California Penal Code:	
Sec. 15	38
Sec. 17	38
Sec. 697	38
Sec. 817	38
Sec. 836	2–3, 42
Delaware Code, Title 11, § 1902	27
General Laws of Rhode Island, Title 12, c. 7, § 1	27
Revised Statutes of New Hampshire, c. 594, § 2	27
English statutes:	
Edw. III, c. 14 (1331)	26
19 and 20 Vict., c. 64 (1856)	26
19 and 20 Vict., c. 69 (1856)	26
Miscellaneous:	
Aglion, *Dictionnaire Juridique* (1947)	30
A. L. I., Code of Criminal Procedure, § 18	29
A. L. I., Restatement of Torts, § 112	29
1 Bousquet, *Dictionnaire de Droit* (2d ed. 1847)	30
Cornelius, *The Law of Search and Seizure* (2d ed 1930)	29
Federal Rules of Criminal Procedure, Rule 41 (e)	6
2 Hale, *Pleas of the Crown* (1st Amer. ed. 1847)	26
2 Hawkins, *Pleas of the Crown* (6th ed. 1777)	26
Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 201	30
Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315	27

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OPINIONS BELOW

The opinion of the court of appeals (R. 166–175) is reported at 256 F. 2d 173. The opinion of the district court denying petitioner's pre-trial motion to inspect the grand jury minutes is reported at 21 F.R.D. 7.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 1958 (R. 175). The petition for a writ of certiorari was filed on June 14, 1958, and granted on April 20, 1959 (R. 176; 359 U.S. 965). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The questions, as limited in the order granting the writ of certiorari (R. 176; 359 U.S. 965), are:

1. Independently of the state court's determination, was the evidence used against petitioner in the federal prosecution obtained in violation of his rights under the Constitution of the United States?

2. If the evidence was unlawfully obtained, was such evidence admissible in the federal prosecution of petitioner because it was obtained by state officers without federal participation?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the Constitution provides, in pertinent part:

> * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * *.

At the time of the arrest in this case, the California Penal Code, § 836, provided, in part, as follows:

> A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

* * * * *

3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.[1]

* * * * * *

5. At night, when there is reasonable cause to believe that he has committed a felony.

STATEMENT

An indictment filed on June 19, 1957, in the United States District Court for the Southern District of California, charged petitioner with unlawful receipt and concealment of more than two ounces of heroin, a narcotic drug, in violation of 21 U.S.C. 174 (R. 1). On July 25, 1957, petitioner was found guilty as charged by a jury (R. 164). He was sentenced to imprisonment for twenty years on August 12, 1957 (R. 165–166). The court of appeals affirmed the conviction (R. 166–175).

The issues in this case relate solely to the seizure by state officers of narcotics dropped on the floor of a public vehicle by petitioner just prior to his arrest. Petitioner moved to suppress the narcotics prior to the federal trial (R. 2). The evidence adduced during the federal proceedings which relates to these issues may be summarized as follows:

At about 10:50 p.m., February 18, 1957, officer D. W. Beckmann and his partner, policewoman Grace, both of whom were plain-clothed members of the Los Angeles, California, police force, observed a

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[1] Paragraph 3 has since been amended to read:

3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.

taxicab parked on a parking lot next to an apartment house at the intersection of First and Flower Streets in Los Angeles (R. 6–7, 12, 56–57). It was unusual to see a cab parked in that location and Officer Beckmann had arrested a narcotics dealer who had been using a taxicab in that same locality some three months earlier (R. 10). The vicinity of First and Flower Streets was known by Officer Beckmann to have a bad reputation for narcotics activity (R. 54, 72). In the nine-month period prior to the arrest in this case, Beckmann had made 22 narcotic arrests, most of them in the vicinity of First and Flower Streets (R. 12, 54–55).

After watching the taxicab for about five minutes (R. 7), Beckmann saw the petitioner walk onto the parking lot. Petitioner returned to the sidewalk, looked up and down the street, walked around the parking lot, then came back and got into the cab (R. 14).

As the taxi moved off into traffic, Beckmann and policewoman Grace followed in an unmarked police car (R. 7, 56). When the cab stopped for a red traffic light, officer Beckmann approached the passenger side and identified himself to both the driver and petitioner, who was sitting in the rear seat (R. 7–8, 13). Beckmann held his police badge in his left hand in such a way as to expose it to both the driver and the petitioner, directed the beam of his flashlight on the badge, and announced that he was a police officer (R. 57–58, 64).[2]

[2] It was also shown that the intersection was well lighted, with overhead lamps at all four corners (R. 64).

The officer did not intend to arrest either petitioner or the cab driver when he walked up to the taxicab (even though the driver had gone through a red light while the police were following the cab (R. 7, 13)). He suspected petitioner of narcotics activity, however, and intended to show his identification, hoping that petitioner would attempt to get rid of any narcotics he might have in his possession upon learning that Beckmann was a police officer. "[I]f he had any junk on him he was either going to eat it, throw it, swallow it or stash it" (R. 14).

Beckmann's hopes were realized, for, as he was showing his credentials, petitioner became agitated, withdrew a white object from his jacket pocket, and dropped it on the floor of the vehicle. The officer directed his flashlight beam on the object and saw that it appeared to be a condom filled to a length of approximately five inches with a white powdery substance (R. 7–8, 52–53, 63, 110–111). He knew, as a result of his experience, that this was a container commonly used by narcotics dealers to carry heroin (R. 53–54, 72–73). The officer sought to open the cab door to retrieve the white object; petitioner simultaneously attempted to open and exit through the same door. As petitioner emerged from the taxicab, Beckmann held him and told him he was under arrest on suspicion of a narcotics violation (R. 7–8, 64). While holding petitioner, who was struggling and pulling away, Beckmann told policewoman Grace to retrieve the narcotics (R. 65–66, 77). Coming from the other side of the vehicle where she had stationed herself, the policewoman did so (R. 18–19, 76, 81).

Less than one minute elapsed from the approach of the officers to the moment of arrest (R. 121, 160).[3] Subsequent analysis revealed that the condom contained 60 grams of heroin—enough for from 500 to 1000 doses of narcotics (R. 6, 8–9, 18, 63, 67, 103–104, 161).

It was also shown that no federal officers had taken part in the arrest and seizure, that officer Beckmann had not had any contact with federal agents before or at the time of petitioner's arrest, and that the officer had never had occasion to work with federal officers (R. 50). It was only after an unsuccessful attempt to prosecute petitioner for violations of the state narcotic laws[4] that Beckmann discussed the case with his

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[3] Petitioner broke away from the officer and fled after being arrested. He disregarded several orders to halt, and, after a footchase of some distance, Beckmann finally had to shoot and wound petitioner to retake him (R. 154–155).

[4] Petitioner had been charged with the state felony of possession of narcotics (California Health and Safety Code, § 11500). The case came on for trial on May 10, 1957, in the Superior Court of the State of California for the County of Los Angeles before Judge Odemar, sitting without a jury. Petitioner immediately moved to suppress the evidence that had been obtained at the time of his arrest. The court, on the basis of the transcript of the preliminary hearing which he had read pursuant to a stipulation of the parties, and with substantially no argument, found that the officers did not have probable cause to believe that petitioner had committed a felony at the time they approached the taxicab, and granted the motion to suppress. The prosecutor, not yet having opened the People's case, then rested, and the court thereupon found petitioner "not guilty as charged" (R. 22–25). Although the substance of the proceeding was not essentially different from a hearing on a pre-trial motion to suppress in the federal practice (see Rule 41(e), F.R. Crim. P.), under the California practice the grant of the motion to suppress resulted in petitioner's acquittal.

superiors and suggested giving the evidence to the federal authorities (R. 50–51, 71–72). Beckmann then went to the federal narcotics representatives and gave them a full statement concerning the incident (R. 70–72).

The federal district court, finding the facts substantially as set out above, overruled petitioner's motion to suppress, holding that no arrest was made until petitioner emerged from the taxicab and that there was then probable cause to justify an arrest without warrant and the subsequent seizure; that, in any event, there was no actual search because the petitioner had abandoned the narcotics in a public vehicle; and that, finally, there had been no federal participation in the incident (R. 98–101). The court of appeals affirmed the conviction, holding that the district court's "uncontested finding and conclusion that the seizure was legal" warranted its denial of the motion to suppress. The court also held that, even if it was assumed that the seizure was illegal, the evidence was nevertheless admissible in the federal trial under the "silver platter" doctrine of *Lustig* v. *United States*, 338 U.S. 74, 78. The court held that that doctrine, under which evidence is admissible in the federal courts if there has been no federal participation in the seizure, was applicable even though a state court had previously determined that the seizure was illegal and the defendant had been acquitted in the state proceeding (R. 170–171).[5]

[5] See note 4, *supra*. Petitioner did not argue in the court of appeals that the seizure was unlawful on the facts of the case (R. 168), nor did he make that contention either in his petition for certiorari or in his reply to the government's memorandum.

SUMMARY OF ARGUMENT

I

The courts below held both that the evidence was lawfully seized by the state officers and that, even if not, it would nevertheless be admissible under the "silver platter" doctrine. Our argument on the second issue is developed in our brief in *Elkins* v. *United States*, No. 126, which is to be argued with this case, and this brief will be limited to the question whether the seizure by the state officers was lawful.

Petitioner contends that his arrest occurred at the moment the officers approached the cab and identified themselves to him and that this "arrest" was illegal because they did not, at that time, have probable cause to believe that he had committed a felony. Our position is, as the district court held, that the arrest did not occur until petitioner emerged from the taxicab and that by that time the intervening events had given the officers more than ample cause so to believe.

II

The action of the officers precipitating petitioner's disclosure of the narcotics in his possession consisted

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Instead, petitioner contended only that the federal court was bound by the state court's conclusion that the seizure was illegal (R. 168–169; Pet. 14–15), also raising an issue of double jeopardy similar to that decided in *Abbate* v. *United States*, 359 U.S. 187, and *Bartkus* v. *Illinois*, 359 U.S. 121. The question of the binding effect of the state court's ruling, which the government treated as a question of *res judicata* in its memorandum (pp. 8–10), has been foreclosed by the limited grant of certiorari. Nevertheless, petitioner in his brief on the merits (pp. 15–16, 28) again attempts to raise that issue. That he cannot do. *Irvine* v. *California*, 347 U.S. 128, 129–130; *Mazer* v. *Stein*, 347 U.S. 201, 208; see *Lawn* v. *United States*, 355 U.S. 339, 362 fn. 16.

of nothing more than walking up to the taxicab in which petitioner was riding, while it was standing at a stop light, and identifying themselves as police officers. The lawfulness of that action must be determined independently of the events that subsequently transpired or of the fact that petitioner, because of his guilty knowledge, was misled by that action to believe that his crime had been discovered and thereby induced to betray himself. If the action would not have violated the rights of an innocent person who, not reacting as petitioner did, was allowed to proceed on his way, it did not violate petitioner's rights.

A. Our primary contention is that, in simply approaching the stationary taxicab and identifying themselves, the officers did not place petitioner under any restraint. They neither stopped the taxicab, touched petitioner, nor said anything that could be construed as an assertion of power to detain petitioner against his will. Nor would there have been a restraint if petitioner had not betrayed himself and the officers had proceeded to ask questions about his suspicious behavior. No more than anyone else does an officer require a legally-sufficient justification to ask a question, and he may properly investigate his suspicions, however unfounded they may prove to be, by directly questioning the suspect. The mere asking of a question, in short, is not itself a restriction of liberty. Nor is it made so by the possible anticipation of the person questioned that *if* he attempts to leave he will *then* be restrained. What the officers may have intended to do if certain events that did not

transpire had actually transpired is irrelevant; the only issue is whether what they in fact did was lawful. Here, all the officers did was approach the stopped car and identify themselves, and that action by itself did not restrain petitioner's freedom and was entirely lawful.

B. We contend in the alternative that, even if the very approach of the officers is thought to have restrained petitioner's freedom of movement, the temporary detention involved did not constitute an arrest, was adequately justified by petitioner's suspicious behavior, and hence was not "unreasonable" within the meaning of the Fourth Amendment. We do not believe that the Court, by its brief comments on a related question in *Henry* v. *United States*, No. 17, this Term, intended to foreclose further consideration of the problem when presented to the Court with full argument, and accordingly we approach the question as one yet to be fully developed and considered.

1. The questioning of persons suspected of criminal activities or likely to have knowledge of them is a necessary and proper part of law enforcement, and in our view police officers may properly, if reasonable under the circumstances, detain persons for a limited time for that purpose. The reasonableness of a particular detention depends of course upon all the circumstances, but the propriety of such action in some circumstances seems evident—for example, establishing a roadblock in the vicinity of a kidnapping, or holding persons who have witnessed a murder until the investigator has had an opportunity to question them.

And since ancient times it has been recognized that reasonable suspicion not amounting to "probable cause" is a proper basis upon which to stop a pedestrian for a limited time and ask questions. A person in a vehicle is in no different position, and the need for a power to impose a temporary restraint on such persons may be even greater. In the case of a pedestrian, it may be possible to ask a question without restricting his movement, but in the case of a moving vehicle it is necessary to stop the vehicle before the occupant can even be approached.

Such a limited detention for purposes of inquiry is not an "arrest" as that term is understood at common law—a taking into custody to hold to answer for a crime—and the common law requirement of "probable cause" for an arrest which is implicit in the Fourth Amendment is not in terms applicable. The true inquiry is not whether there was probable cause as such but only whether, under all the circumstances, the detention amounts to an "unreasonable" seizure of the person within the meaning of the Fourth Amendment.

Being stopped by a police officer for purposes of inquiry may at times cause some inconvenience to the person stopped, but that temporary inconvenience is normally minor compared to the importance of such reasonable inquiry to effective law enforcement. Without the power, for example, to stop a suspiciously-acting automobile to ask questions, the police might be forced to spend fruitless hours investigating actions which the occupant, had the police been able to ask him questions, could readily have explained

as being entirely innocent. In a fair balancing of the interests at stake, we submit that the rights of the person questioned are adequately protected by his privilege not to answer and that the police, having reasonable grounds for inquiry, ought not to be foreclosed from at least the opportunity, by asking questions, to determine whether further investigation is necessary.

2. The action of the officers in this case was reasonable under the circumstances. They did not stop the taxicab or intend to restrain petitioner in any way. Their purpose was simply to identify themselves to petitioner in the hope, which was realized, that if he did have narcotics he would reveal himself by attempting to get rid of them. If that action was an impairment of petitioner's liberty, it was an impairment of a most limited sort which was fully justified by the facts then known to the officers. Petitioner had boarded the taxicab in an area noted for illicit narcotics activity and had carefully surveyed the street and reconnoitered the parking lot before entering the vehicle. The waiting taxicab was itself parked at an unusual place. While we do not contend that those observations gave the officers probable cause to believe that petitioner was committing a felony, they did arouse in the officers a reasonable suspicion and give them cause to investigate further and to take the limited action that they did to confirm or dissipate their suspicions.

III

If we are correct in our view that the action of the officers in approaching the taxicab and identifying themselves was not itself unlawful, their subsequent arrest of petitioner and seizure of the narcotics were fully justified by the intervening events. Immediately after the officers identified themselves, petitioner, presumably believing that he had been detected, removed a white object from his pocket, dropped it to the floor, and attempted to get out of the vehicle. That action—precisely the course of events anticipated by the officers if petitioner did in fact have narcotics in his possession—by itself gave the officers probable cause to believe that the object contained narcotics and that petitioner was therefore guilty of a felony. When the officer turned the beam of his flashlight on the discarded object and saw it to be a condom—an article known by him to be commonly used to carry narcotics—filled with a whitish powder, probable cause ripened almost into a certainty. And it was only then that the officers arrested petitioner and recovered the narcotics from the floor of the taxicab.

At that point, it cannot be doubted that the officers, having seen what was unmistakably narcotics in petitioner's possession, had adequate grounds to arrest petitioner, and accordingly the seizure of the narcotics can be justified as incident to a lawful arrest. Logically, however, the propriety of the seizure does not depend upon the arrest, and it can be independently

sustained on the ground that petitioner had abandoned the property and that, since it was contraband, the officers were entitled to seize it without warrant when they came upon it in the course of their lawful activities.

ARGUMENT

I

INTRODUCTION

Whether the heroin taken from the floor of the taxicab by the state officers was properly admitted into evidence turns first upon whether the heroin was lawfully seized by the state officers and, second, whether, even if illegally seized by them, it could nevertheless be used in a federal trial. Our argument on the second issue, the so-called "silver-platter doctrine" question, is developed at length in our brief in *Elkins* v. *United States*, No. 126, this Term—set for argument immediately preceding this case—and will not be repeated here. The argument in this brief will be limited to the first question, namely, whether the seizure by the state officers was lawful.

Petitioner's argument that the seizure was unlawful is based entirely on the contention that the state officers did not have probable cause to believe that petitioner had committed a felony when they first approached the taxicab. That assumes, contrary to the holdings below, that such action of the officers constituted an arrest. Petitioner would have the Court ignore the significance of the events intervening

between the officers' approach to the taxicab and the actual arrest and seizure.[6]

The events immediately preceding the seizure may be divided into four steps:

(1) While the taxicab in which petitioner was riding was standing at a stop light, officer Beckmann walked to the side of the car, cast his flashlight on his badge, and said that he was a police officer.

(2) Petitioner withdrew from his pocket and dropped on the floor a white object which to the officer (shining his flashlight on it) appeared to be a heroin-filled condom, opened the door, and attempted to take flight.

(3) Officer Beckmann physically restrained petitioner as he emerged from the taxicab and told him he was under arrest.

(4) Officer Grace picked up the condom from the floor of the taxicab.

The controlling question, with which we will first deal (Point II), is whether the action taken at step 1—the appearance and identification of the officers—in and of itself infringed any rights of petitioner guaranteed by the Fourth and Fourteenth Amendments. If it did not, the subsequent events disclosing the contraband and giving cause to believe that petitioner was committing a felony fully justitfied the final seizure of the narcotics (Point III). In the

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[6] The Superior Court for the County of Los Angeles appears to have made the same error, granting the motion to suppress the evidence in the state proceedings solely on the ground that the officers did not have probable cause for an arrest when they first approached the taxicab (R. 24).

first place, being lawfully present at the side of the taxicab (step 1) and thereupon seeing narcotics dropped to the floor (step 2), the officers were entitled to seize the narcotics as contraband (step 4) without regard to the intervening arrest (step 3) or its legality—that is, the seizure would have been lawful even if the officers had not arrested petitioner but had permitted him to depart. Alternatively, if the arrest is significant, the events occurring at step 2 gave the officers probable cause to believe that petitioner was committing a felony, made the arrest (step 3) lawful, and thus justified the seizure (step 4) as one incident to a lawful arrest.

II

THE ACTION OF THE STATE OFFICERS IN APPROACHING THE TAXICAB AND IDENTIFYING THEMSELVES DID NOT INVADE ANY RIGHTS OF PETITIONER.

The question whether the appearance and identification of the officers in itself infringed any rights of petitioner must be answered independently of the events that subsequently transpired. As petitioner correctly observes (Br. 24–25), police action "is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success" (*United States* v. *Di Re*, 332 U.S. 581, 595). By the same token, however, it is not to be made illegal by what it turns up. Thus the question here is the same as it would be if, for example, instead of taking the precipitous action that he did, petitioner had waited to see what the officers

wanted, the officers had asked him if he would answer some questions, he had declined to do so, and the officers, having no basis to hold him, had then departed.

Similarly, the action is not to be appraised in terms of the effects it might have on a person who, being then engaged in the commission of a felony, is led to believe by the officers' appearance that he has been discovered. While the guilty are entitled to invoke the same constitutional protections as the innocent, they are not, because they are guilty, entitled to be free of police action that would not invade the rights of an innocent person. The unexpected appearance of a police officer before a person who has 60 grams of heroin in his pocket may have a drastic impact upon his sense of well-being and cause him to take some self-betraying action. And the hope that his official appearance would have that effect was, in fact, the very reason given by Officer Beckmann for making his appearance: "if he had any junk on him he was either going to eat it, throw it, swallow it, or stash it" (R. 14). But that effect the action has only because of the guilt of the suspect and his fear that he has been discovered; it does not place the guilty man in a preferred position. In our view, the only relevant consideration is the probable effect of the police action upon an innocent person.

In short, the question in this case is the same as it would be if petitioner had been innocent of any wrong-doing and, after either answering or declining to answer any questions, had proceeded on his way.

In such a case, could petitioner have maintained an action for damages, even nominal, for a violation of his constitutional rights? When the question is so viewed, its insubstantiality becomes apparent. As we shall show, the initial action of the officers in approaching the taxicab did not by itself restrict petitioner's freedom in any way and hence no question of justification for the action need be reached. Alternatively, we shall show that, even if the action did restrain petitioner's liberty in some way, there was adequate justification for any temporary detention that may be thought to be involved.

A. PETITIONER'S LIBERTY WAS NOT RESTRAINED BY THE APPEARANCE OF THE OFFICERS

1. Prior to the time of petitioner's panicked self-disclosure, the officers had taken no action which impeded petitioner's progress or placed him under restraint. They did not stop the taxicab; it was then standing at a stop light.[7] They did not touch petitioner, the cab driver, or even the taxicab, and said nothing to petitioner that could be construed as the assertion of a power to detain him against his will. What they did, and all that they did, was walk on a public street to the side of the cab and there announce that they were police officers. Patently, petitioner had no right to exclude police officers (or anyone) from any place on the public streets and he

[7] There is no evidence that the light had turned green before the crucial events had transpired, and such evidence as there is indicates that it is likely that it had not. See R. 70–71, 121, 142.

can hardly contend that the officers' identification of themselves constituted an assault or imprisonment.

There was no more a restraint of liberty here than there is when a uniformed police officer approaches a pedestrian standing on a street corner and, identification being unnecessary, addresses him, or when a policeman knocks at the door of a home and, upon the occupant's opening the door, identifies himself. And if such action is not otherwise a restraint of liberty, it is not made so because the person approached has a state of mind that causes him to be stampeded into self-betrayal by the very appearance of the policeman, or because the officer anticipates that result and takes the action for that very purpose. To say that it is, we submit, would be to construct a rule designed, not to protect the guilty and the innocent alike, but specifically to protect the guilty against action that would not impinge upon either the sensibilities or the rights of an innocent person.

2. In this case, petitioner's indiscreet action of dropping the narcotics was prompted by the very appearance and identification of the officers, and it is upon that that he must stand to show a violation of his rights. In our view, however, there would equally not have been a restriction of petitioner's liberty if he had retained his composure to see what the officers wanted, and the officers had then asked him questions about his activities. However insubstantial, or even irrational, the reasons for his suspicions, a police officer may properly approach a suspect, even at his home, explain his suspicions, and ask

him questions about his actions—the suspect, of course, being equally free to exclude the officer from his home or to refuse to answer the questions. The point is that the mere asking of a question is in no sense a restriction of liberty. No more than any other person does a police officer require a legally sufficient justification to ask a question, and he may do so at any time or at any place that a private person would be privileged to do so.

3. Petitioner may say that as a practical matter he was not free, when the officers approached, to tell the cab driver to drive on when the light changed or to leave the cab and walk away, and that if he had attempted to do so the officers would have stopped him. In the first place, there is no evidence in the record that the officers had that intention. To the contrary, Beckmann's testimony was that he had no intention of detaining petitioner and that his only purpose was to confront him in the hope that he would, as he did, give himself away (R. 14). More than that, however, we think the intention of the officers in that sense—what they might have done had different events occurred—is sheer speculation and irrelevant, and the only significant question is whether what they in fact did was lawful. If petitioner, without disclosing the narcotics, had attempted to leave and the officers had detained him, he would have been in a position to challenge *that* detention; but those events did not happen and in fact the officers made no assertion, prior to petitioner's self-betrayal, of either force or authority to detain him. There was therefore no

actual restriction of his freedom of which he can possibly complain.

It may be true that one approached by a police officer may be uncertain, or even apprehensive, about what the officer is going to do, and may anticipate that he will be stopped if he leaves, but his uncertainty does not by itself mean that he is at present being restrained. A customer asked by a shopkeeper whether he had paid for an article he is taking out of the store may be uncertain whether the shopkeeper will forcibly detain him if he refuses to answer, but he cannot for that reason alone sue the shopkeeper for false imprisonment. The suggestion, moreover, would prove too much, for it would mean that every person approached by a policeman has been restrained of his liberty unless he knew in advance what the officer was going to do. If the person approached wishes to assert his right to leave, he can do so either by asking the officer if he is being held or by attempting to leave. Some persons unfamiliar with their rights may perhaps be intimidated and not attempt to leave when they wish to do so, but it is surely unnecessary to forbid legitimate inquiries in order to avoid the possibility that some individual may fail to assert his rights or be apprehensive that, if he does, the police may then do something unlawful.

In sum, it is our primary position that the action of the officers in approaching the stopped taxicab on a public street and identifying themselves to petitioner was, by itself, entirely lawful and did not in any way restrain petitioner's liberty. That the mere sight of

the officers was enough to make petitioner think that his activities had been discovered and cause him to take the precipitous action that betrayed him did not make unlawful the police actions which were otherwise wholly lawful. And since there was no detention of petitioner, it is irrelevant whether there was a showing of a justification—of probable cause or something less—sufficient to legalize a detention.

B. THERE WAS ADEQUATE JUSTIFICATION FOR ANY DETENTION THAT MAY HAVE BEEN INVOLVED

Alternatively, we contend that, even if it be thought that the approach of the officers operated to restrain petitioner's freedom of movement and hence constituted a temporary detention, petitioner's prior suspicious behavior was sufficient to warrant the officers to take the action they did to investigate their suspicions—*i.e.*, to detain petitioner for a limited period for purposes of inquiry. Our secondary position, in other words, is that even if there was a detention, it was, under all the circumstances, not an "unreasonable" one within the meaning of the Fourth Amendment and hence not a violation of due process under the Fourteenth.

It is this question—whether a limited detention for purposes of inquiry may, in some circumstances, be made on less than probable cause—that was latent, but not argued by the Government, in *Henry* v. *United States*, No. 17, this Term, decided November 23, 1959. As explained in the Government's brief in that case, the Government did not rely on that theory because a

concession had been made in the lower courts and repeated in the brief in opposition to certiorari that an arrest occurred when the agents first stopped the car and that the sole issue was whether the agents then had probable cause to believe that a federal crime was being committed. Whether or not that concession was technically binding on the Government in that particular case, it was deemed inappropriate to raise in this Court, for the first time on the merits, an argument not only not raised but expressly disavowed in the lower courts and in the opposition to the petition for certiorari. Cf. *Giordenello* v. *United States*, 357 U.S. 480, 487–488.

In its opinion in the *Henry* case, the Court, after noting the Government's concession, went on to say (slip op., p. 5):

> That is our view *on the facts of this particular case*. When the officers interrupted the two men and restricted their liberty of movement, the arrest, *for purposes of this case*, was complete. [Emphasis added.]

In view of the Government's failure to argue the question, the fact that the Court did not develop the point in its opinion, and the Court's emphasis that it was so holding only "for purposes of this case" and "on the facts of this particular case," we do not believe that the brief comments quoted above were intended to foreclose a fuller consideration of the question when, in an appropriate case, it was presented to the Court with full argument, or to hold that an automobile can never be stopped for purposes of inquiry

unless the officers are then possessed of probable cause to believe that an offense is being or has been committed. We shall, accordingly, approach the question as one yet to be fully developed and considered by the Court.

Our position is generally that investigation is a legitimate and necessary part of law enforcement; that a police officer may stop a person for the purpose of inquiry on less information than would constitute probable cause for his arrest; and that any temporary detention that may be involved in the act of making inquiry does not constitute an arrest. We think further that this is as true of a passenger or driver in a vehicle as it is of a person walking in the street, except to the extent that, in judging the reasonableness of the officer's action, one factor to be considered is the manner in which the vehicle is stopped. Where, as here, the vehicle is at a standstill, an officer may as legitimately approach and detain the occupants to make inquiry as he could a pedestrian, even though that same basis might not be sufficient to justify forcing a moving vehicle to the curb with a police car or, at a further extreme, shooting at the tires of a vehicle to force it to stop. In short, we think that police officers have a right to make *reasonable* inquiry even though some restriction of movement is involved; that the issue of whether the inquiry is reasonable is to be determined under all the circumstances; and that here the inquiry was reasonable.

1. *The limited detention involved in making inquiry is not an arrest; its propriety must be judged by reasonableness under all the circumstances*

a. Inquiry and investigation are a necessary part of law enforcement. It has never seriously been questioned that police officers have the right to detain momentarily for questioning individuals who, either by their own fault or by the web of circumstance, have been brought into the field of legitimate police inquiry. Thus, persons present at the scene of a murder could legitimately be detained for a short time for questioning about what they had seen, and asked to give their names and addresses, whether or not there was basis for suspicion that any of them had any part in the crime. Any person so questioned could, of course, refuse to answer, but that does not affect the duty and right of the officers to make inquiry.

The extent to which this right of detention exists, both as to time and place, must necessarily depend upon the varying circumstances of the particular case. As to investigation of completed crimes, the seriousness of the offense, the proximity to or remoteness from the scene of the crime, the amount of time which had elapsed, the suspicious circumstances involved, would all have to be weighed. As to suspicion that a crime has been or is about to be committed, all the factors giving rise to suspicion would have to be considered in relation to the nature of the detention. And one of those factors historically has always been

the time of day or night in which a person has been observed behaving in a suspicious manner.

Since ancient times English courts have held that law enforcement officers may on suspicion, not amounting to probable cause, properly detain a pedestrian for a time and ask questions. "Yet it is holden by * * * some, That any private person may lawfully arrest a suspicious night-walker, and detain him till he make it appear that he is a person of good reputation." 2 Hawkins, *Pleas of the Crown* (6th ed. 1777), c. 12, § 20, p. 122. While Hawkins suggests that there was dispute about the right of private persons to detain in this manner, there was no question in the case of early law enforcement officials. Hawkins continues (*supra*, c. 13, § 5, p. 129):

> As to the power of watchmen, it is farther enacted by the said statute of Winchester, c. 4. "That if any stranger do pass by the watch, he shall be arrested until morning. And if no suspicion be found, he shall go quit; * * *."

Sir Matthew Hale writes that constables had equal powers to detain for a limited time on suspicion. 2 Hale, *Pleas of the Crown* (1st Amer. ed. 1847), 89, 96–97; see Edw. III., c. 14 (1331), repealed by 19 and 20 Vict., c. 64 (1856), when the compulsory county constabulary act was passed, 19 and 20 Vict., c. 69. See also *Lawrence* v. *Hedger*, 3 Taunt. 13, 15 ("in the night * * * it is highly necessary that they [the watchmen] should have such a power of detention. * * * There was abundant ground of suspicion here."); and *Rex* v. *Bootie*, 2 Burr. 864, 867.

No such question of overnight detention on suspicion alone is involved here. The point of the matter is that the law has long recognized that a peace officer is entitled to take steps to confirm or dissipate his reasonable suspicions; he must ask questions to resolve his doubts; and the best and most logical person of whom he should make inquiry is the person he suspects.

While the basis for a temporary detention has been imperfectly articulated, American courts, both federal[9] and state,[10] are agreed that the right to

[8] States which by statute have authorized temporary detention for questioning without arrest have placed a flat time limit on such detention. Revised Statutes of New Hampshire, c. 594, § 2 (4 hours); General Laws of Rhode Island, Title 12, c. 7, § 1 (2 hours); Delaware Code, Title 11, § 1902 (2 hours). Section 2 of the Uniform Arrest Act, reprinted in full in Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 343–347, would authorize a police officer to stop and question "any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime," and to detain for as much as two hours anyone so questioned who "fails to identify himself or explain his actions to the satisfaction of the officer."

[9] *Green* v. *United States*, 259 F. 2d 180, 181 (C.A. D.C.), certiorari denied, 359 U.S. 917; *Lee* v. *United States*, 221 F. 2d 29, 30 (C.A. D.C.); *Poulas* v. *United States*, 95 F. 2d 412, 413 (C.A. 9); *Weathersbee* v. *United States*, 62 F. 2d 822 (C.A. 5), certiorari denied, 289 U.S. 737; see *Carter* v. *United States*, 231 F. 2d 232, 235 (C.A. 5), certiorari denied, 351 U.S. 984; *Ellis* v. *United States*, 264 F. 2d 372, 374 (C.A. D.C.), certiorari denied, 359 U.S. 998; see *Burton* v. *United States* (C.A. 9), decided November 16, 1959.

[10] *State* v. *Gulczynski*, 32 Del. 120, 123, 120 Atl. 88, 89 (officer walked up to defendant on the street and asked him what he

make inquiry on suspicion exists, and that it is inherent in the very nature of the investigative process. This has been the ruling of the courts of California, whose rulings would normally govern the conduct of the California police involved in this case. Although "[t]here is no statute prescribing the exact manner in which enforcement officers shall investigate the activities of a suspect" (*People* v. *Seely*, 66 Cal. App. 2d 408, 152 P. 2d 454, 456), the California courts have long held that a proper method of investigation is to ask questions of a prospective witness (*People* v. *Smith*, 141 Cal. App. 2d 399, 296 P. 2d 913, 914), or a suspect (*People* v. *Michael*, 45 Cal. 2d 751, 290 P. 2d 852, 854; *People* v. *Jaurequi*, 142 Cal. App. 2d 555, 298 P. 2d 896, 899), and that an officer may stop a pedestrian on suspicion (not amounting to probable

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had in the package he was carrying); *People* v. *Hennemann*, 367 Ill. 151, 10 N.E. 2d 649, 650 (officers were informed that there were suspicious-looking persons sitting in an automobile; "That the officers had a right to stop and question plaintiff in error cannot be doubted * * *."); *Campbell* v. *Commonwealth*, 203 Ky. 151, 261 S.W. 1107, 1108 ("their frank admission of their possession of the whiskey, made in response to the inquiry of the officer, alone justified their arrest by the latter * * *."); *Hargus* v. *State*, 58 Okla. Cr. 301, 54 P. 2d 211, 214 ("it is not unlawful for a peace officer * * * to make a reasonable inquiry of strangers or others * * *."); *Johnson* v. *State*, 118 Tex. Cr. Rep. 293, 42 S.W. 2d 421 (officers drove up alongside a person walking on the street and questioned him); *Pena* v. *State*, 111 Tex. Cr. Rep. 218, 12 S.W. 2d 1015, 1016 ("the officer * * * [properly] followed appellant down the railroad track and inquired what was in the suitcase."); *State* v. *Zupan*, 155 Wash. 80, 283 Pac. 671, 674 ("Under the [suspicious] circumstances, it was not an infringement of appellant's constitutional rights to accost him and inquire as to his business.").

cause) to make those inquiries (*Gisske* v. *Sanders*, 9 Cal. App. 13, 98 Pac. 43, 45) even though there is not a right to make an arrest at that moment (*Baines* v. *Brady*, 122 Cal. App. 2d Supp. 957, 265 P. 2d 194, 196–197). "A police officer has a right to make inquiry in a proper manner [on suspicion] of anyone upon the public streets." *Gisske* v. *Sanders*, *supra*.

b. The Fourth Amendment does not require "probable cause" for the limited detention that may be involved in stopping a person for brief questioning in the course of investigation. In terms, the Fourth Amendment forbids only "unreasonable" searches and seizures. The standard of probable cause as the test of reasonableness for an arrest is not explicit but was evolved from the common law of arrest and from the implications of the Fourth Amendment's prohibition of warrants not supported by probable cause. Both that prohibition and the common law requirement of probable cause for arrest were concerned, however, only with a "seizure" of the person of a nature implied by the term "arrest" as that was understood at common law—*i.e.*, the taking of a person into custody for an indefinite period to hold him to answer for a crime.[11] As we have seen, the com-

[11] American Law Institute, Code of Criminal Procedure, § 18:

> Arrest is the taking of a person into custody in order that he may be forthcoming to answer for the commission of an offense.

American Law Institute, Restatement of Torts, § 112:

> An arrest is the taking of another into the custody * * * for the actual or purported purpose of bringing the other before a court, or of otherwise securing the administration of the law.

See also, Cornelius, *The Law of Search and Seizure* (2d ed. 1930),

mon law recognized a distinction between temporary detentions for inquiry and an "arrest" for a crime, and probable cause was required only for the latter. Similarly, we think, the "warrant" required by the Fourth Amendment to be supported by probable cause was the traditional warrant of arrest, and hence that provision carries no implication that probable cause is required for limited detentions for inquiry that are less than a common law arrest. Accordingly, we submit that in cases of such limited detentions not amounting to an arrest at common law the only question is whether the temporary restraint on liberty incident to investigation is "unreasonable" within the spirit of the Fourth Amendment. That is, the "probable cause" standard of reasonableness governing arrests is not controlling, and the true inquiry is simply whether, under all the circumstances, the action of the officers in stopping or detaining persons is reasonable.

A distinction between the requirements for an arrest and for a temporary detention for purposes of inquiry is, moreover, a necessary one if law en-

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sec. 47, p. 156; Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 201; *Long* v. *Ansell*, 69 F. 2d 386, 389 (C.A. D.C.); *Morton* v. *United States*, 147 F. 2d 28, 30, fn. 7 (C.A. D.C.); *Jenkins* v. *United States*, 161 F. 2d 99, 101 (C.A. 10).

There is no significance in the derivation of arrest from the French "arrêter," to stop. The French have almost the same word as we have for arrest—"arrestation"—with virtually the same meaning that an individual is taken into official custody in order to answer for an offense. 1 Bousquet, *Dictionnaire de Droit* (2d ed., 1847) 143; Aglion, *Dictionnaire Juridique* (1947) 41.

forcement is not to be unduly hampered. Crime is neither detected nor solved without investigation, and inquiry of persons who may have relevant knowledge is an essential part of investigation. The burden imposed on individuals by being stopped or detained for a short period—on a reasonable basis—so that investigating officers may have an opportunity to question them is, we believe, slight in comparison to the interest of society in crime prevention and detection.

The importance of promptly questioning a possible suspect does not lie primarily in obtaining incriminatory evidence against him. It is perhaps even more important as a means of dissipating suspicions and releasing the officers from further fruitless investigation. In this case, for example, the actions of petitioner observed by the police, while giving them good cause to investigate, were no more than suspicious, and if petitioner was in fact innocent a few questions by the police officers might well have been enough to dispel their doubts. The result of forbidding the officers to ask those questions would be to force them either to abandon the investigation or to spend perhaps fruitless hours investigating a suspicion that could have been immediately quelled by petitioner. Since the suspect always has the right, if he chooses, not to answer any questions, we think that his interest in being free from being stopped to permit the officers to ask the questions does not involve such fundamental rights as to require the police to

abandon a direct and efficient way of determining at least whether there is need for further investigation.

The fact that an automobile rather than a person walking in the street may be involved is a factor to be considered in determining the reasonableness of the inquiry, but it does not change the essential character of the action of the officers in making the inquiry. A person in an automobile may as reasonably be the object of suspicion as a person in the street, and the need for inquiry may be even greater because of the mobility of the automobile. To the extent that the stopping of a moving vehicle presents elements of greater danger than the stopping of a pedestrian in the street, the nature of the detention may properly be considered in relation to the factors justifying inquiry. Thus, a person in a parked car, who acts suspiciously, may be subject to inquiry just as a passer-by would be subject to inquiry. A car at a standstill for a red light, as in this case, is in the same position. On the other hand, something more might be required for the kind of forcible stopping involved in shooting at tires, or crowding a speeding automobile off the road as in *Brinegar* v. *United States*, 338 U.S. 160. But, even so, the stopping for inquiry is not an arrest and may, if reasonable under all the circumstances, be based on less than would be necessary to justify taking a driver or passenger into custody for the purpose of charging him with a crime.

c. The suggestion of Mr. Justice Jackson in *Brinegar* that it would be justifiable to throw up a roadblock and stop all cars where a kidnapping had taken

place in the immediate vicinity [12] affords an example of the reasonableness of and need for a power to detain persons momentarily on something less than probable cause, for it could scarcely be said that anything approaching "probable cause", as it is understood in connection with the law of arrest, exists as to each and all of the cars passing that way. Nor would the apparently innocent presence of individuals near the scene of a serious crime, such as murder, seem to fit any concept, however loose, of probable cause. Yet it can hardly be questioned that it is often reasonable to detain such persons temporarily for questioning.

The majority of this Court in *Brinegar* v. *United States*, 338 U.S. 160, found it unnecessary to reach the question of the right of officers to stop a vehicle for questioning on facts insufficient to constitute probable cause to arrest, since the Court found that the

[12] *Brinegar* v. *United States*, 338 U.S. at 182, 183 (dissenting opinion):

> Undoubtedly the automobile presents peculiar problems for enforcement agencies, is frequently a facility for the perpetration of crime and an aid in the escape of criminals. But if we are to make judicial exceptions to the Fourth Amendment for these reasons, it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.

facts initially known were sufficient, in themselves, to constitute probable cause for the arrest, search, and seizure. However, the view that such a right exists was expressed in Mr. Justice Burton's concurring opinion in *Brinegar*, 338 U.S. at 178–180, and in the Tenth Circuit opinion in that case. 165 F. 2d 512. The view has received articulation in recent rulings of the Eighth Circuit in *Smith* v. *United States*, 264 F. 2d 469, and *McCarthy* v. *United States*, 264 F. 2d 473. In *Smith*, the court of appeals said, 264 F. 2d at 472:

> Where the situation involved is one of such seeming probability, an Alcohol Tax Unit agent is warranted in stopping a car, with indication of his official status, for the purpose of inquiring of the driver as to his identity or making observation of the vehicle. Probable cause may perhaps not at that time exist for searching the interior of the car, but if there is a warranting basis for stopping the vehicle, such information as the agent acquires in incidence, from proper acts of conversation or observation, is legally entitled to be taken into account in testing the probable cause which can be regarded as existing as to a subsequent search in which the agent may engage.

In the companion case of *McCarthy* v. *United States*, 264 F. 2d 473, 475, the court said:

> We think that the elements of the present situation gave rise to such seeming probability as would be capable of reasonably impressing with more than mere suspicion that appellant was not going about ordinary affairs but was

> presumably engaged in using the car for improper alcohol-purpose. Within the basis discussed in *Smith* opinion, this entitled the agents to at least stop the car for the purpose of inquiring of the dealer as to his identity and making observation of the vehicle.

Choosing the opposite alternative from that adopted by this Court in *Brinegar,* the Eighth Circuit said:

> Whether, if the stopping had resulted in adding no further elements to the situation, the agents would have been justified in making a search of the car, we need not decide. As in the *Smith* case, elements were properly added by the stopping, which, in conjunction with what the agents had previously seen and knew, were entitled to be regarded as constituting adequate probable cause to warrant the search and seizure thereafter made. * * *

See also *Lawson* v. *United States,* 254 F. 2d 706 (C.A. 8); *Jordan* v. *United States,* 254 F. 2d 710 (C.A. 8); *Morgan* v. *United States,* 159 F. 2d 85, 86 (C.A. 10); and *Fowler* v. *United States,* 239 F. 2d 93, 96 (C.A. 10).

The Sixth Circuit has similarly held that the stopping of a vehicle does not constitute an arrest. *Gilliam* v. *United States,* 189 F. 2d 321 (C.A. 6). There, agents for the Alcohol Tax Unit, acting on information forwarded by a deputy sheriff which he stated had come from a reliable source, stopped the defendant on a public highway and asked him how much liquor he had with him. Defendant got out a small jar and said that was all, and that he had found it by

the public highway. The agents thereupon conducted a search of his vehicle, which revealed a substantial quantity of non-tax-paid liquor. In affirming the conviction, the court said (p. 323):

> The question presented is not whether probable cause existed before the automobile was stopped and the officers talked with appellant. The question is whether the combination of what the officers saw with the reliable information they had received is probable cause to justify the search.
>
> The stopping of appellant's car was not an arrest. No intent to apprehend appellant was shown and no move was made to take him into custody at that time. The officers did not open the car door when it was stopped, nor state that appellant was under arrest, nor touch his person. At the commencement of the search, which was after the car had been stopped, reasonable grounds existed for believing that a felony was being committed, and the subsequent arrest was valid.

Police officers have a duty to inquire even if they do not know enough to warrant arrest. The inconvenience to a citizen involved in the temporary stopping for inquiry is minor compared to the importance of such inquiry to proper law enforcement. A forcible stopping for inquiry must, moreover, have a reasonable basis. That reasonable basis may, however, be something less than would itself constitute probable cause for searching the vehicle or arresting the occupant, *i.e.*, probable cause to believe that a crime is or has been committed, or that contraband is in the car.

Where, as here, the officer does not stop the car, but for the purpose of making his inquiry merely approaches one which has already stopped, his action is proper if there is even slight basis for reasonable suspicion.

2. *The officers had a reasonable basis for inquiry*

At the time when officer Beckmann approached the taxicab in which petitioner was riding, he knew that petitioner had boarded the vehicle in an area of Los Angeles notorious for its illicit drug activity. The officer had personally made numerous arrests for offenses against the California narcotic drug laws in that section. Beckmann had observed petitioner's actions before petitioner boarded the conveyance; he had seen petitioner peer up and down the street and reconnoiter the parking lot before entering the waiting vehicle. It was itself unusual that the taxicab was waiting for petitioner in that place at that hour of the night. The net of all this was enough to give the officer reasonable ground for inquiry.

The officers did not impede the progress of the taxicab in any way; they waited until it stopped for a traffic signal before taking any step to confirm or dissipate their suspicions. Beckmann had no intention of making an arrest when he walked up to the vehicle; but he did intend to identify himself and make inquiry, hoping that if petitioner was then committing a narcotics offense he would take a step which would give himself away and or in some other manner confirm the officer's justified suspicions. Petitioner did just that, for as the officer identified him-

self petitioner dropped a filled container similar to that often used by narcotics dealers to transport their wares, and attempted to leave the vehicle.

As a Los Angeles city policeman, Beckmann was a peace officer charged with the duty of preventing and investigating public offenses. California Penal Code, §§ 15, 17, 697, 817; *People* v. *Perry*, 79 Cal. App. 2d 906, 180 P. 2d 465, 467. The total circumstances occurring in the nighttime here justified this experienced police officer in his determination to make inquiry. So long as inquiry was justified, the officer had good reason to approach the vehicle, more so than if petitioner had been a pedestrian, since the taxi would soon be on its way and impossible for an officer on foot to follow.

The courts have upheld inquiry under similar circumstances. In *People* v. *Blodgett*, 46 Cal. 2d 114, 293 P. 2d 57, 58, officers became suspicious of a taxicab which was double-parked in front of a hotel at 3:00 a.m. and approached to investigate. When they directed the defendant, one of the passengers in the vehicle, to alight, they saw him withdraw his hand from between the back seat and back cushion. Removal of the back seat revealed the presence of marihuana. The Supreme Court of California said:

> There is nothing unreasonable in an officer's questioning persons outdoors at night. * * * [I]n view of the hour and the unusual conduct of the occupants of the cab it was not unreasonable for the officers to order them to get out of the cab for questioning.

Lee v. *United States*, 221 F. 2d 29, 30 (C.A. D.C.), shows that what was done in this case was proper

under federal as well as California law. There, the police were investigating a murder and knew that jewelry had been stolen from the premises where the murder occurred. They received information that a person was attempting to sell jewelry on a metropolitan street. Police officers approached the automobile in which defendant was sitting and asked him to step out of the vehicle. As defendant complied, he dropped a number of articles of jewelry (wrapped in a handkerchief) in the street. Subsequent investigation disclosed that the jewelry had been stolen from a jewelry salesman and was not connected to the murder. The court of appeals had no difficulty in holding the jewelry admissible in defendant's prosecution for larceny, saying:

> The officers had no warrant. However they clearly had a right, indeed it was their duty investigating a murder and with the information upon which they acted, to approach, confront and interrogate the accused. * * *

Petitioner here might have elected to stand his ground and disclose nothing. He might not have confirmed the officer's suspicions in any way. Had he chosen that course, no arrest would have been made, since Beckmann did not intend to arrest on suspicion alone. But the officer was entitled to make inquiry to dissipate or confirm his suspicions, especially since it was not necessary to impede petitioner's progress in order to ask questions. Inquiry under the circumstances of this case, therefore, even if it could be construed as momentarily restricting petitioner's liberty, was both rational and lawful.

III

IF THE OFFICERS LAWFULLY APPROACHED THE TAXICAB, THEIR SUBSEQUENT SEIZURE OF THE NARCOTICS AND ARREST OF THE PETITIONER WERE LAWFUL

If we are correct in our view that the action of the officers in approaching the taxicab and identifying themselves did not itself invade any rights of petitioner's, their subsequent seizure of the narcotics and arrest of petitioner were fully justified by the intervening events and cannot seriously be challenged.

1. Analytically, the lawfulness of the seizure of the narcotics, the question directly at issue, does not depend upon either the fact or the legality of the arrest: the seizure would, we submit, have been proper even if, for example, the officers had not arrested petitioner as he emerged from the taxicab but had allowed him to leave unmolested.

Immediately after officer Beckmann identified himself, petitioner removed a white object from his pocket, dropped it to the floor, and attempted to leave the taxicab. At that point, as the district court held (R. 100–101), petitioner had intentionally abandoned the object in a public vehicle, and without more, the officers were entitled to take it into custody as abandoned property.[13]

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[13] *Hester* v. *United States*, 265 U.S. 57, 58; *Haerr* v. *United States*, 240 F. 2d 533, 535 (C.A. 5); *Lee* v. *United States*, 221 F. 2d 21, 30 (C.A. D.C.); *Ellison* v. *United States*, 206 F. 2d 476, 478 (C.A. D.C.); *Martin* v. *United States*, 155 F. 2d 503, 504–505 (C.A. 5); *Brady* v. *United States*, 148 F. 2d 394, 395 (C.A. 9); see *Mason* v. *United States*, 257 F. 2d 359, 360 (C.A. 10), certiorari denied, 358 U.S. 831; cf. *Work* v. *United States*, 243 F. 2d 660 (C.A. D.C.); *Hobson* v. *United States*, 226 F. 2d 890, 893–894 (C.A. 8).

Whether or not the property was abandoned, it was subject to seizure as contraband which the officers came upon in the course of their lawful activities. Coupled with the officers' prior knowledge of petitioner's suspicious actions in an area noted for its narcotics activity, petitioner's attempt, upon seeing the officers, to rid himself of the object and take flight—precisely the action the officers had anticipated if petitioner did in fact have narcotics in his possession—by itself gave the officers reasonable cause to believe that the object contained narcotics. Turning the beam of his flashlight on the discarded object,[14] officer Beckmann saw it to be a condom filled with a whitish powder. Knowing from experience that such containers were commonly used to carry narcotics, the officer then knew to a virtual certainty that the object contained narcotics. And having come upon contraband in the course of their lawful activities, the officers were, as this Court has long recognized, entitled immediately to seize it without a warrant. *Harris* v. *United States*, 331 U.S. 145; *Zap* v. *United States*, 328 U.S. 624; *Steele* v. *United States*

[14] Beckmann did not make a "search" by looking into the vehicle, since it is not a search to see what is open and patent either in daylight or in artificial light generated by the officers. *United States* v. *Lee*, 274 U.S. 559; *Petteway* v. *United States*, 261 F. 2d 53, 54 (C.A. 4); *Bell* v. *United States*, 254 F. 2d 82, 87 (C.A. D.C.), certiorari denied, 358 U.S. 885; *Ellison* v. *United States*, 206 F. 2d 476, 478 (C.A. D.C.); *Fisher* v. *United States*, 205 F. 2d 702, 703 (C.A. D.C.), certiorari denied, 346 U.S. 872; *McQuaid* v. *United States*, 198 F. 2d 987 (C.A. D.C.), certiorari denied, 344 U.S. 929; *Safarik* v. *United States*, 62 F. 2d 892, 895 (C.A. 8); *Smith* v. *United States*, 2 F. 2d 715 (C.A. 4); *Boyd* v. *United States*, 286 Fed. 930 (C.A. 4).

No. 1, 267 U.S. 498; see *Adams* v. *New York*, 192 U.S. 585, 598; *Carroll* v. *United States*, 267 U.S. 132, 158.

2. Although we believe that the arrest was not a logically necessary step to justify the seizure, the seizure can also be sustained as incident to petitioner's lawful arrest.

Under § 836 of the California Penal Code (*supra*, pp. 2–3), the officers were authorized to arrest petitioner without a warrant if they had "reasonable cause to believe that he has committed a felony." The California courts have given to that standard substantially the same meaning as this Court has given to the "probable cause" standard of the Fourth Amendment—namely, knowledge of facts "'sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."

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[15] Lower courts have consistently followed the same rule. See *Kelly* v. *United States*, 197 F. 2d 162 (C.A. 5) (customs official searching for aliens illegally entering the country found non-tax-paid liquor); *Love* v. *United States*, 170 F. 2d 32 (C.A. 4), certiorari denied, 336 U.S. 912 (distillery found in defendant's home by officers seeking to arrest one Foster, who was believed to be hiding therein); *Lane* v. *United States*, 148 F. 2d 816 (C.A. 5), certiorari denied, 326 U.S. 720 (officers searching for defendant to arrest him found articles used to make non-tax-paid liquor in defendant's garage); *Bowles* v. *Glick Bros. Lumber Co.*, 146 F. 2d 566, 570–571 (C.A. 9), certiorari denied, 325 U.S. 877 (sales at illegal prices found while inspecting books required by law to be kept); *Bowles* v. *Ray*, 146 F. 2d 652 (C.A. 9), certiorari denied, 325 U.S. 875 (same); *Bennett* v. *United States*, 145 F. 2d 270 (C.A. 4), certiorari denied, 323 U.S. 788 (search warrant for counterfeiting apparatus justified seizure of counterfeit ration coupons). See also cases cited in n. 13, *supra*.

Draper v. *United States*, 358 U.S. 307, 313.[16] Thus, the legality of the arrest under both state and federal law turns upon the same question—whether at the time of the arrest the officers had probable cause to believe that petitioner was committing a felony.

If, as we have contended, the officers' initial approach did not constitute an arrest and petitioner was not arrested until he emerged from the taxicab, there can, we think, be no doubt of the legality of the arrest, for the intervening events gave the officers more than ample grounds to believe that petitioner was possessed of narcotics and hence committing a felony. While we do not contend that the officers had probable cause so to believe when they approached the taxicab, they did have such cause no later than the time when petitioner confirmed their suspicions (and rewarded their anticipations) by removing a white object from his pocket, dropping it on the floor, and

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[16] The California courts use "probable cause" and "reasonable cause" interchangeably (*People* v. *Brown*, 147 Cal. App. 2d 352, 305 P. 2d 126, 128; *People* v. *Hood et al.*, 150 Cal App. 2d 197, 309 P. 2d 856, 858), defining the former as "a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true" (*People* v. *Wickliff*, 144 Cal. App. 2d 207, 300 P. 2d 749, 752, *People* v. *Mendoza*, 145 Cal. App. 2d 279, 302 P. 2d 340, 343; see *People* v. *Gusukuna*, 152 Cal. App. 2d 135, 312 P. 2d 714, 716) and the latter as "such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest, strong suspicion, that the person in question is guilty of a crime" (*People* v. *Woods*, 139 Cal. App. 2d 515, 293 P. 2d 901, 907, certiorari denied, 352 U.S. 1006). See also *Trowbridge* v. *Superior Court*, 144 Cal. App. 2d 13, 300 P. 2d 222, 225.

attempting to flee. When officer Beckmann lighted the object with his flashlight and recognized it to be a condom, an article commonly used to carry narcotics, filled with a narcotic-like powder, the probable cause ripened into almost conclusive evidence and thus more than adequately supported the arrest.

It is established, of course, that officers have the right "to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases." *Weeks* v. *United States*, 232 U.S. 383, 392; *Carroll* v. *United States*, 267 U.S. 132, 158; *Agnello* v. *United States*, 269 U.S. 20, 30. Here, it was not even necessary to search petitioner to recover the contraband. Policewoman Grace merely recovered the filled container from the floor of the taxicab where petitioner had dropped it in plain sight. On this basis, then, the seizure of the narcotics was reasonable as the lawful incident of a valid arrest.

CONCLUSION

For the foregoing reasons and those stated in our brief in No. 126, it is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys.

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JOINT BRIEF OF
AMERICAN CIVIL LIBERTIES
UNION AND AMERICAN
CIVIL LIBERTIES UNION
OF SOUTHERN CALIFORNIA
AS AMICI CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 52

JOSE TERRONES RIOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA AS *AMICI CURIAE*

A. L. WIRIN,
257 S. Spring Street,
Los Angeles 12, California,

ARTHUR D. DECKELMAN,

Attorneys for Amici Curiae.

ROWLAND WATTS,
MELVIN L. WULF,
of Counsel.

INDEX

	PAGE
Interest of Amici Curiae	1
Statement of the Case	2
Summary of Argument	3
ARGUMENT:	
I. Weeks v. United States, Rea v. United States and Benanti v. United States preclude the use of the evidence in question	4
II. A. On the facts of this case, the United States should be precluded from prosecuting petitioner after an earlier prosecution in a state court	7
B. The Federal Government, in deference to the Fourth Amendment, should be precluded from prosecuting petitioner	9
Conclusion	11

Citations

Abbate v. United States, 27 U. S. L. Week 4225 (U. S. March 30, 1959)	7, 8
Bartkus v. Illinois, 27 U. S. L. Week 4233 (U. S. March 30, 1959)	7, 8
Benanti v. United States, 355 U. S. 96 (1957)	4, 6, 7
Byars v. United States, 273 U. S. 28 (1927)	4, 10
Gallegos v. United States, 237 F. 2d 694 (C. A. 10, 1956)	5
Lanza v. United States, 260 U. S. 377 (1922)	3, 7, 9, 10
Lustig v. United States, 338 U. S. 74 (1949)	4
People v. Cahan, 44 Cal. 2d 434, 282 P. 2d 905 (1955)	5, 7
Rea v. United States, 350 U. S. 214 (1956)	4, 5
United States v. Peterson, 268 Fed. 864 (1920)	8
Weeks v. United States, 232 U. S. 383 (1914)	4, 5, 7, 10
Wolf v. Colorado, 338 U. S. 25 (1949)	4, 6, 9

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JOINT BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA AS *AMICI CURIAE*

Interest of *Amici Curiae*

The American Civil Liberties Union and its Southern California affiliate are submitting this brief with the consent of both parties, filed with the Clerk of this court. As the only nationwide non-partisan organization concerned solely with the safeguard of our constitutional rights, amici are again concerned with the deprivation of those fundamental rights.

Amici's interest in the present case concerns the application of the Fourth and Fifth Amendments. The right to privacy guaranteed by the Fourth Amendment has, we

believe, been breached by the decisions of the courts below. Likewise, we believe that the guarantee in the Fifth Amendment that an individual who has once been tried in a court of law shall not be tried again for the same offense has not been observed in this case.

It is our view that the Fourth and Fifth Amendments have been violated as the result of judicial efforts to accommodate our federal system. We do not believe that the interplay in that system should be permitted to defeat fundamental human liberties.

Statement of the Case

On February 18, 1957, while petitioner was in a taxi-cab, two Los Angeles police officers approached the cab which was waiting for a traffic signal. A series of events resulted in petitioner's arrest and the seizure of a package of narcotics which was found in the cab. There had been no warrant issued for petitioner's arrest nor for the search. Petitioner was unknown to police officers, had not been seen committing any offense, nor was he known to be a participant in a crime.

Criminal proceedings were instituted against petitioner in behalf of the People of California charging him with violating Section 11500 of the California Health and Safety Code.

On May 10, 1957, in the Superior Court of the State of California, petitioner's motion to suppress the package of narcotics on the ground it had been illegally seized was granted. A judgment of acquittal was thereupon rendered.

On June 19, 1957, the Federal Grand Jury for the Southern District of California, charged petitioner with a violation of 21 U. S. C. Section 174. On hearing prior to trial, petitioner's motion to quash the indictment on the

ground it had been obtained solely on the basis of the same evidence which the state court had suppressed as unlawfully obtained was denied. The court then considered the question of unlawful search and seizure de novo and ruled that the evidence had not been unlawfully obtained. The jury returned a verdict of guilty and sentence was imposed.

Appeal was filed by petitioner in the United States Court of Appeals for the Ninth Circuit which affirmed. A petition for certiorari was filed in this court and certiorari was granted March 20, 1959.

Summary of Argument

I

It is the common policy of the United States and California to exclude evidence that has been illegally obtained. The application of the "silver platter doctrine" by the court below circumvented this common policy. The fact that the state court found that state officials had illegally obtained evidence which was later used to prosecute petitioner in federal court, is persuasive reason to preclude its use by the federal courts.

II

A. The doctrine of *Lanza* v. *United States*, 260 U. S. 377 (1922), should not apply where the laws of a state and the national government prohibit the identical conduct.

B. Dual prosecution by a state and the national government, upon the facts of this case, gives disproportionate weight to the right of a sovereign to enforce its criminal laws at the expense of society's interest in the right to privacy guaranteed by the Fourth Amendment.

ARGUMENT

I

Weeks v. *United States*, *Rea* v. *United States* and *Benanti* v. *United States* preclude the use of the evidence in question.

Amici believe that prior cases by this court implementing the policy embedded in the Fourth Amendment, compel a holding in this case that the evidence in question was improperly admitted by the District Court.

From *Weeks* v. *United States*[1] to *Benanti* v. *United States*,[2] this court has been fashioning a rule to exclude evidence in federal prosecutions which has been wrongfully obtained, either in violation of the Constitution as in *Weeks*, or in violation of a statute[3] as in *Benanti*.[4] It has, however, declined to apply the rule to state prosecutions,[5] but in *Rea* v. *United States*[6] it was applied—under the power of the Supreme Court "to enforce the Federal Rules [of Criminal Procedure] against those owing obedience to them"[6a]—to enjoin a federal officer from testifying in a state court as to the fruits of his illegal search.

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[1] 232 U. S. 383 (1914).

[2] 355 U. S. 96 (1957).

[3] 48 Stat. 1103, 47 U. S. C., Section 605.

[4] Until *Benanti*, this court had limited the exclusionary rule to wrongful seizures by Federal officers or those in which Federal officers had participated. *E.g. Wolf* v. *Colorado*, 338 U. S. 25 (1949); *Lustig* v. *United States*, 338 U. S. 74 (1949); *Byars* v. *United States*, 273 U. S. 28 (1927).

[5] *Wolf* v. *Colorado*, 338 U. S. 25 (1949).

[6] 350 U. S. 214 (1956).

[6a] *Id.* at 217.

During the same period of time, the lower federal courts have evolved a correlative rule—the "silver platter doctrine"—which permits evidence wrongfully seized by state officers alone to be used in a prosecution in the federal courts.[7]

Although the instant case comes within that doctrine, the fact that the California rule of evidence applicable to illegally seized evidence follows the *Weeks* rule[8] raises other considerations as well.[9]

By adopting the *Weeks* rule, the judiciaries of each sovereign have transformed a fundamental but static principle embedded in the Fourth Amendment into a dynamic norm of conduct. But by application of the "silver platter doctrine," the court below has affirmed the circumvention of this common policy notwithstanding an express finding by the state court that state officers had illegally procured evidence, thereby vitiating a state prosecution. We believe these circumstances bring this case squarely within the ambit of *Rea v. United States, supra.*

In *Rea*, this court enjoined a federal agent from testifying in a state court concerning the fruits of his search found by a United States District Court to have been illegally conducted. In the case at bar the circumstances are identical but reversed, i.e., evidence illegally procured under state law by a state officer is sought to be used in a federal prosecution. That the federal court made a de novo determination of the legality of the search is, we suggest, beside the point. Whether or not the state court in *Rea* would also have held a de novo hearing did not concern

[7] *E.g., Gallegos* v. *United States*, 237 F. 2d 694 (C. A. 10, 1956).

[8] *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905 (1955).

[9] Amici wish to point out that they entirely agree with the grounds for reversal set forth in petitioner's brief. They are, however, impressed by the circumstances raised by virtue of the California exclusionary rule and will stress that point in this brief.

this court; rather, it held that the fruits of an illegal search by a federal officer were ipso facto inadmissible in *any* court. The court said, "[The Federal Rules] are designed to protect the privacy of the citizen. * * * That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings."[10] Putting to the side the question whether a state court has the power to enjoin a state officer from testifying in a federal court as not in issue here, there is no question that this court's "supervisory powers over the Federal court system"[11] permits the exclusion of the evidence in question. We urge that it do so.

This court is committed to the principle that an illegal search by state officers contravenes the Fourth Amendment.[12] Regardless of its view as to the constitutionality of the admission of such evidence in the state courts, where considerations of comity exist that are not present here, we urge the court to buttress the right to privacy guaranteed by the Fourth Amendment by refusing to countenance illegal conduct of state law enforcement officers as a means of enforcing the criminal law of the United States.

Benanti v. *United States*, *supra*, lends further support to this position. The rationale of that case was that "Section 605 contains an express, absolute prohibition against the divulgence of intercepted communications"[13] and the purpose of excluding evidence obtained in violation thereof was the "enhancement of the proper administration of criminal justice."[14]

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[10] 350 U. S. at 218.

[11] *Benanti* v. *United States*, 355 U. S. at 99.

[12] *Wolf* v. *Colorado*, 338 U. S. 25 (1949).

[13] 355 U. S. at 102.

[14] *Id.* at 103.

The rule in *Weeks* and *Cahan*,[15] although judicial rather than legislative, is at least as absolute as the prohibition in Section 605. Its violation by state officers should be no more condoned than was the violation in *Benanti*. In addition, the evidence here was inadmissible in the state court whereas in *Benanti* the wiretap evidence would have been admissible in the New York courts.[16] A state court ruling which fructifies a policy embodied in the Constitution ought not be lightly repudiated.

II

A. On the facts of this case, the United States should be precluded from prosecuting petitioner after an earlier prosecution in a state court.

In *Lanza* v. *United States*[17] it was announced that "* * * an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both, and may be punished by each. The Fifth Amendment, like all other guarantees in the first eight amendments, applies only to proceedings by the Federal Government, and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority."[18]

We disagree with *Lanza* and believe that its doctrine should not be applied here. Prior to *Lanza*, it had been

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[15] *Supra* note 8.

[16] 355 U. S. at 102.

[17] 260 U. S. 377 (1922).

[18] *Id.* at 382. This court recently reaffirmed the *Lanza* doctrine: *Abbate v. United States*, 27 U. S. L. Week 4225 (U. S. March 30, 1959); *Bartkus v. Illinois*, 27 U. S. L. Week 4233 (U. S. March 30, 1959).

held—with reference to the same body of law, viz., the National Prohibition Act,[19]—that where both the state and federal governments proscribed identical conduct, "a conviction in a state court for conduct which is in violation of the Prohibition Act, is a bar to a prosecution in the federal courts."[20]

We believe that the distinction to be drawn is between (a) identical conduct prohibited in closely identical terms, and (b) related conduct growing out of the same transaction but which clearly covers a peculiar interest of each sovereign. In the first case, a prosecution by one sovereign should bar a subsequent prosecution by the other. In the second case, double jeopardy ought not attach.

The instant case involves a violation of 21 U. S. C., Section 174 and Section 11500 of the California Health and Safety Code.[21] Each statute prohibits the identical conduct. Putting to the side the question of dual prosecution under closely related conduct, it is plain to us that dual prosecution for identical conduct is a manifest injustice. It vests in prosecuting officers the discretion of imposing double punishment.[22] Such unbridled discretion grants executive officials a power subject to dangerous abuse which, under other circumstances than those present here, could raise substantial questions under the due process clause of the Fifth Amendment and under the Eighth Amendment.

Under the circumstances of the case at bar, we believe the Fifth Amendment prohibition against double jeopardy

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[19] 41 Stat. 305.

[20] *United States* v. *Peterson*, 268 Fed. 864 (1920).

[21] Both statutes are set out in full in Petitioner's brief, p. 84.

[22] See the statement of Attorney-General William P. Rogers issued shortly after the decisions in *Abbate* and *Bartkus*, *supra*, note 18. N. Y. Times, April 6, 1959, p. 1, col. 4. The instant prosecution was instituted prior to that statement.

bars the prosecution below. At the very least, the concept of dual sovereignty should yield where an earlier state prosecution has been instituted under a statute proscribing identical conduct.

B. The Federal Government, in deference to the Fourth Amendment, should be precluded from prosecuting petitioner.

The Fourth Amendment to the Constitution protects the people of the United States against illegal search and seizure by state officials.[23] Mr. Justice Frankfurter, speaking for a majority of the court, said, "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the states through the Due Process Clause."[24] The doctrine announced in *Lanza* must be examined in light of the Fourth and Fourteenth Amendments.

In the case at the bar the earlier prosecution did not determine that the petitioner had or had not committed an offense against a sovereign, but rather it was determined in preliminary proceedings that the prosecution must fall because state officers had failed to observe a constitutional mandate prohibiting illegal search and seizure. California, like the United States, implements this constitutional right by prohibiting the use of evidence procured through its violation. This circumstance significantly distinguishes the instant case from other applications of the *Lanza* doctrine.

Where the United States government undertakes to prosecute an individual after he has been tried for related acts in a state court, we will admit, arguendo, that the subsequent prosecution is warranted on the ground that

[23] *Wolf* v. *Colorado*, 338 U. S. 25 (1949).

[24] *Id.* at 27.

the Federal government is thereby protecting a valid national interest, viz., protecting itself against criminal acts. But where—as here—the earlier prosecution has failed due to the violation of a constitutional proscription, that interest of the federal government does not stand alone. It must be weighed against the interest of society as a whole in preserving intact the constitutional prohibition against the invasion of privacy.

The guarantee against the invasion of privacy has been strengthened by both the United States and California by prohibiting the admission of evidence obtained in violation of that guarantee. Both sovereigns believe that such a rule of evidence plays an indispensible role in enforcing the right to privacy. The rule is a reflection of the judicial interest in the social value to be ascribed to protection against "arbitrary intrusion by the police." Speaking for the court, Mr. Justice Day in *Weeks* said, "To sanction [the admission of illegally seized evidence] would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the *people* against such unauthorized action." (Emphasis supplied.)[25]

The interests to be weighed here are the right of the United States to prosecute crimes against itself; and the right of the people to be free of illegal search and seizure. In *Weeks* the balance was struck in favor of the right to privacy. In *Lanza* the balance tipped in favor of the sovereign. Where elements of the two combine, we urge

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[25] *Weeks* v. *United States*, 232 U. S. 383, 394. Mr. Justice Sutherland's views were to the same effect: "The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies, and the assurance of any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the Constitutional right." *Byars* v. *United States*, 273 U. S. 28, 33-34.

that the fundamental nature of the right to privacy transcends, in a federal system, a sovereign's right to place a citizen twice in jeopardy.

The United States government need not indulge in methods which "regarded superficially, may seem to escape the challenge of illegality."[26] It should be content to rely upon a state court's determination where that determination breathes life into the Constitution.

Conclusion

The right to be free of gratuitous governmental interference stands high in the hierarchy of civil liberties. Consequently, not only the interests of the injured individual come to bear in a given case. Rather, the cumulative interest of society as a whole is always at stake when the liberty of any one of us is infringed. The decision in this case revolves around the conflict between the enforcement of the criminal law and the integrity of the Constitution. We urge that the Constitution prevail.

By reason of the foregoing, the decision below should be reversed.

Respectfully submitted,

A. L. Wirin,
257 S. Spring Street,
Los Angeles 12, California,

Arthur D. Deckelman,

Attorneys for Amici Curiae.

Rowland Watts,
Melvin L. Wulf,
of Counsel.

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[26] *Supra* note 25.